NO. 82-1554

IN THE

Supreme Court of the United States

October Term, 1982

CHARLES E. STRICKLAND,
Superintendent
Florida State Prison;
JIM SMITH, Attorney General
of Florida, and LOUIE L. WAINWRIGHT
Secretary, Florida Department
of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,

Respondent.

On Writ of Certiorari
to the United States
Court of Appeals for the
11th. Circuit
"Former Fifth Circuit (Unit B)"

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. WHETHER THE ELEVENTH CIRCUIT CORRECTLY REVERSED THE DENIAL OF THE RESPONDENT'S HABEAS CORPUS APPLICATION WHILE FAILING TO CONSIDER OR APPLY THE PRESUMPTIVE VALIDITY AND FACTUAL FINDINGS OF FOUR STATE COURTS AND THE DISTRICT COURT?

2. WHETHER THE ELEVENTH CIRCUIT IN OVERRULING THE SUPREME COURT OF FLORIDA AND REJECTING THE EN BANC OPINION OF ANOTHER COURT OF APPEALS, HAS APPLIED THE CORRECT STANDARD FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL?

3. WHETHER THE ELEVENTH CIRCUIT HAS PROPERLY APPLIED UNITED STATES V. FRADY, __U.S.___, 102 S.CT. 1584 (1982) AND THE STANDARD FOR THE DEGREE OF PROOF AND THE BURDEN OF PROOF REQUIRED IN COLLATERAL PROCEEDINGS?

4. WHETHER DEFENSE COUNSEL PROVIDED "CONSTITUTIONALLY ADEQUATE REPRESENTATION."

QUESTIONS PRESENTED CONTINUED

5. WHETHER THE COURT OF APPEALS HAS MISAPPLIED FAYERWEATHER V. RITCH, 195 U.S. 276 (1904) TO EXCLUDE A STATE TRIAL JUDGES TESTIMONY OR WHETHER THAT DECISION SHOULD BE OVERRULED OR LIMITED, WHERE THE STATE TRIAL JUDGE TESTIFIES AS AN EXPERT AND AS THE PRESIDING JUDGE, THAT THE NEW EVIDENCE OFFERED BY THE DEFENDANT WOULD MAKE NO DIFFERENCE UPON THE IMPOSITION OF THE DEFENDANT'S SENTENCE?

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PREFACE

The following references are made herein:

(A) For the "Appendix of Petitioner on Jurisdiction," consisting of pages A1-A324.

(TR) For the original transcript-of-record-on-appeal in Washington v. State, 362 So.2d 658 (Fla. 1978) consisting of pages TR1-TR636.

(R) For the U.S.D.C record on appeal consisting of exhibits and pages R1-R103.

(T) For the habeas corpus evidentiary hearing, consisting of pages T1-T198.

(JA) For the Joint Appendix which contains inter alia: the original transcript on appeal. The U.S. District Court transcript; all psychiatric reports and the Defendant's Rule 3.850 exhibits, and consists of pages JA1-JA510.

I

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, is reported at Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982)(Unit B)(Former Fifth)(en banc) (A1-A206). The opinion of the United States District Court for the Southern District of Florida is printed at A252-A295 and is presently unreported.

The opinion of the Supreme Court of Florida is reported at Washington v. State, 397 So.2d 285 (Fla. 1981)(A244-252). The opinion of the Florida trial court is printed at A206-A252 and is unreported.

II

JURISDICTION

On December 23, 1982, the United States Court of Appeals for the Eleventh Circuit, sitting en banc reversed and remanded the United States District Court's denial of the Defendant's Petition for a Writ of Habeas Corpus[1]. Neither the State nor the Defendant filed a motion for a rehearing.

The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Rule 17 of the Rules of the Supreme Court; Title 28 U.S.C. §1254(1) and Amendments VI and XIV of the United States Constitution.

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[1]The Respondent will be referred to herein as "the Defendant" and the Petitioners will be referred to as "the State."

privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. §2254(a) provides that:

"The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Title 28 U.S.C. §2245 provides inter alia, that:

"On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence."

IV

STATEMENT OF THE CASE

Relevant to this proceeding, the Defendant confessed, plead guilty and was convicted of three counts of first degree murder and sentenced to death for each conviction by the Florida State trial court. Washington v. State, 362 So.2d 658 (Fla. 1978), cert. den. 441 U.S. 937 (1979). The Defendant was also simultaneously convicted of numerous other serious offenses. Id. The three criminal episodes resulting in the Defendant's convictions are succinctly described in Washington v. State, to wit:

> "These appeals arise out of a series of murders committed by appellant during a twelve-day period. On September 20, 1976, appellant and an accomplice formulated a plan to rob and kill Daniel Pridgen. The purported motive for the killing was the fact that Pridgen, a minister, was a homosexual and in appellant's opinion a man of the cloth violated religious and moral precepts by

> engaging in homosexual activities. According to the plan, appellant's accomplice was to induce Pridgen to engage in homosexual activities. When Pridgen was undressed and in bed, the accomplice was to cough two times as a sign for appellant to enter the home and kill Pridgen. Appellant entered the Pridgen home when the signal was given and while the accomplice covered Pridgen's face with a pillow and held him helpless, appellant stabbed the victim to death. Appellant and his accomplice stole certain items from Pridgen's home, attempted to wipe their fingerprints from surfaces about the house, and fled." Id., at 660.

The "Birk" murder three days later is detailed thus:

> Appellant carried a rope, a knife and a gun with him to the residence. By appellant's admission, the gun was loaded. Having arrived in the area of the home, appellant concealed himself outside of the residence and kept the home under surveillance for some period of time. Appellant waited until he was relatively certain that the occupants of the home, Mrs. Birk and her three sisters-in-law, were together in one room. Once this occurred,

appellant cut the screen on the Birks' front door and entered the residence. Appellant disguised himself by tying a rag around a portion of his face. Appellant instructed the four occupants to lie on the floor. Two of the women complied with appellant's demand, and appellant permitted one woman to seat herself in a chair. Mrs. Birk went into the kitchen and obtained a box containing money, which she offered to appellant. At this point, appellant cut the telephone cord and proceeded to tie up the four women. As appellant was completing this task, he observed Mrs. Birk inching her way into the kitchen. An argument ensued between the two, and appellant shot Mrs. Birk in the head and repeatedly stabbed her with his knife, causing her death. Appellant thereafter approached his bound victims, shooting each in the head and inflicting several stabb wounds. Appellant then fled to his home, carrying the money box. After arriving at his home, appellant counted the stolen money and disposed of the knife and the money container. Each of the sisters-in-law survived the assault. However, one women became blind in one eye, one suffers breathing difficulties

due to the knife wounds to her lungs, and one remains in a comatose, vegetable state.[2]" Id. at 660-661.

The third murder of "Frank Meli" which is progressively more brutal, is described thus:

"On approximately September 27, 1976, appellant contacted his third victim, Frank Meli, by telephone in response to the latter's newspaper advertisement for the sale of an automobile. After briefly conferring with Meli, appellant terminated the telephone conversation. The following morning, appellant again called the Meli residence and arranged to meet Meli at a particular intersection for a test drive of the vehicle. Following the test drive, appellant persuaded Meli to go to appellant's home to obtain the money to conclude the sale. Upon Meli's entry into appellant's home, appellant brandished a knife and forcibly bound his victim to a bed. Two of appellant's companions assisted appellant in guarding Meli to prevent an escape. Appellant

---

[2]The "comatose" victim subsequently also died. See, Washington v. Strickland, 693 F.2d 1243, at 1247, n. 1 (5th Cir. 1982)(A91).

succeeded in selling Meli's automobile and then forced Meli to telephone his family and request a ransom.

On the morning of September 29, 1976, appellant paid his companions part of the proceeds from the sale of the automobile for their assistance in holding Meli captive. Appellant's friends left the residence and appellant entered the bedroom where Meli had been tied spreadeagled to a bed. The testimony at this point is conflicting. Appellant stated in his subsequent written confession to police that Meli had untied one of the four straps securing him to a bed and a struggle ensued. It is uncontested, however, the appellant stabbed Meli eleven times. During the stabbing, appellant's companion entered the bedroom and covered Meli's face with a pillow to prevent others from hearing the victim's screams. When appellant and his companion left the room a few minutes later, Meli was fatally wounded but still alive. Before leaving, appellant secured Meli's bonds and gagged him. Appellant then proceeded to an intersection where he had arranged to meet Meli's brother and obtain the ransom money. After loitering in the area for several minutes,

> appellant observed what he believed to be police officers on a stake-out. Reaching the conclusion that Meli's brother had contacted the police, appellant left the area and returned home. Appellant reentered the bedroom in which Meli was being held and found is hostage dead. Appellant then dug a shallow grave in his backyard and buried his victim's body." Id. at 661.

The Defendant was subsequently apprehended when the police were closing in on the "Meli" investigation. Id. at 661-662. He then proceeded to confess to all three killings. Id. The Defendant's confessions are contained in the Florida trial record at TR459-TR474 (Pridgen killing); TR486-TR519 (Birk killing); TR528-TR552 (Meli killing).

The Defendant was indicted on October 7, 1976 for the murder of Meli. (TR238) and on November 18, 1976 for the murder of Birk and Pridgen (TR242-TR248). The Defendant pleaded guilty to all

charges and a subsequent escape charge on December 1, 1976. See, TR254; Id. at 661-662.

Relative to this appeal, the Defendant carefully explained to the Florida trial court that the decision to plead guilty was entirely the Defendant's idea and was contrary to his defense counsel's advice:

> "THE COURT:. . .Are you satisfied with the way he worked your case?
>
> "THE DEFENDANT: I want to say this. I think this is about one of the best lawyers you could ever get. But for the crimes I feel I was 100 percent--I was guilty. I would have gave up. I believe I would have got with my wife and I would have come forth with the evidence anyway. He didn't have no grounds to fight it on. I don't believe in telling no lies. You understand what I am saying?
>
> THE COURT: As an officer of the court, it is his responsibility to take the legal steps necessary for the protection of his client's interests.
>
> "THE DEFENDANT: I understand.

"THE COURT: Do you understand that by pleading guilty you, in fact, stop that work that he is going and those steps that he may have made be they technical or otherwise. Now he is foreclosed from doing them.

"THE DEFENDANT: Yes, sir. I understand. I want to say this. Like I say, you can't get a better lawyer. He didn't have any grounds to fight on because I gave a confession.

"THE COURT: He made himself available at the time you wanted to see him.

"THE DEFENDANT: He was there. He was always there.

"THE COURT: You have no reason to indicate to me anything other than you would have me appoint him on another case?

"THE DEFENDANT: I tell you this, if it was left up to him, he would fight this to the Supreme Court. But, I told him I would rather go ahead and plead because it don't make sense to try to hide it when I know I'm guilty." [Emphasis added]. JA54-JA56.

In the few weeks prior to the Defendant's plea, defense counsel invoked reciprocal discovery, TR251; filed a written demand for specific discovery, TR259-TR266; filed two Motions to Dismiss the indictments and death penalty as unconstitutional, TR261-TR265; TR364-TR368 and a Motion to Suppress Defendant's Confessions Admissions and Statements, TR369. The State's response to the Defendant's demand for discovery lists seventy-eight (78) witnesses and numerous other discovery exhibits and informations. TR272-TR279. Defense counsel furthermore adopted all the various motions filed by co-defendants Taylor and Mills[3]. See, TR324, TR252. Mills and Taylor also filed various Motions to Suppress, Demands for

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[3]The co-defendants' subsequent convictions are reported at Mills v. State, 407 So.2d 218 (Fla. 3d DCA 1981) and Taylor v. State, 386 So.2d 825 (Fla. 3d DCA 1980).

Discovery and Motions directed toward the indictment. Relative to this proceeding the trial court ascertained that the Defendant was not pleading guilty in order to avoid the death penalty, and the trial court noted that it had made no determinations whatsoever as to what penalty to apply:

> "THE COURT: You may just as well get the death penalty from me as not. I will follow the law. I am not one of those judges that will automatically not give the death penalty. Do you understand that?
>
> "THE DEFENDANT: I do.
>
> "THE COURT: . . . I don't want you ever coming back here, if in fact it should be determined that I find the aggravating circumstances outweigh the mitigating circumstances and sentence you to death, and hear Mr. Tunkey or Pollock say somebody told you that was not what I was going to do.
>
> "THE DEFENDANT: Yes, sir. I understand.
>
> "THE COURT: Has anybody told you there was any deal involved in my court?

"THE DEFENDANT: No, sir.

THE COURT: I would sure like you to tell me if there was.

"THE DEFENDANT: I would like to say this. I believe the crime fits the punishment and I don't want to die. You understand what I am saying, but I say if I got to sit up in some jail and rot I would rather get the chair.

"THE COURT: We will resolve the question of punishment. I want you to be satisfied that I have a great deal of respect for people who are willing to step forward and admit their responsibility. That is not an automatic key to the door nor is it anything else.

We will have a hearing on what the evidence is, but I do not want you to be laboring under some pretense that is false that I let my feelings be known as to what sentence I would give in this case.

The only conversation I have had with these two lawyers is whether or not I would hear this case without a jury and I told everybody I would hear every case without a

jury as long as both sides waive that right. I am not afraid of the case. I want you to understand that that is the extent of my involvement.

Have you any information that would lead you to believe that there has been anything more than that?

"THE DEFENDANT: No. I haven't.

"MR. TUNKEY: I can put on the record--I am sure he will agree with me- that if anything I told him there is absolutely no guarantee as to what sentence; that it would be consecutive life terms with no parole, or he could face the electric chair on each one. I told him I do not have any information concerning what the sentence might be.

As far as that area of the question ing, that has been our conversation on numerous occasions."[Emphasis added]. JA61-JA64.

Subsequently, on December 6, 1976, the Florida State trial court conducted a sentencing proceeding. See, JA79-JA331. The State produced ten (10) witnesses and fifteen (15) exhibits setting forth the crimes, including the Defendant's confessions, which were recounted in their

entirety at the penalty proceedings. See, JA124-JA139 (Pridgen killing); JA124-JA139 (Birk killing); JA261-JA278 (Meli killing). The State's other evidence and witnesses merely corroborated the details of the killings as graphically portrayed in the Defendant's confessions. Officer Charles Major discussed his investigation of the Pridgen murder and the Defendant's confession. JA103-JA154. Officer Major testified that the Defendant had intended to kill Pridgen at all times. JA124-JA125. Medical examiner Elidio Fernandez, testified as to the autopsy of Pridgen. JA154-JA161.

Ruth Pitzer was a surviving victim in the Birk killing and testified as to the events during and after the Birk killing. JA162-JA175. Similarly, Julia Sullivan, who was also a victim, also recounted the Birk killing. JA176-JA184.

Officer David Simmons explained his investigation of the Birk killing and the Defendant's confession. JA184-JA223. The Defendant told Officer Simmons that when Birk attempted to resist the robbery, he stabbed and shot her and then did the same to the other three women who had witnessed the Birk killing. JA214-JA216. Dr. Hubert L. Rosonoff testified that one of the other victims of the Birk killing was still comatose from the brutal attack of the Defendant. JA224-JA228; but see, n. 2, supra. Officer John Spiegel testified as to his investigation of the Meli murder; his observations of the Defendant when the Defendant appeared at a "drop" site to pick up the ransom money for Meli and the fact that the police had traced the Defendant to the scene of the Meli killing when the Defendant surrendered. JA236-JA251. Detective Charles Zatrepalek testified as to the

Defendant's surrender and confession to the Meli killing. JA253-JA286. Detective Zatrepalek testified specifically that the Defendant intended to kill Meli at all times. JA284-JA285. The witness, Harry Coleman, corroborated the Defendant's statement in his confession that the Defendant had used the proceeds from the Meli killing to buy a motorcycle. JA287-JA288. Medical Examiner Wright was also recalled and testified as to the removal of Meli's body from a shallow grave, which was described in the Defendant's confession. JA294-JA310. He also testified as to the eleven stab wounds to the body of Meli and the ligatures still attached to the body, which the Defendant had indicated were used to tie Meli to the bed where he was murdered. Id.

In the Florida trial court, defense counsel argued vigorously that four of

the statutory aggravating circumstances under Section 921.144, Fla.Stat. clearly did not apply and that statutory mitigating circumstances did apply under subsections (a) and (b), relating to the fact that the Defendant had no history of criminal activity and that the Defendant committed the murders while under extreme mental or emotional disturbance. See, JA332-JA336. Defense counsel also argued that the trial court should consider as non-statutory mitigation that the Defendant surrendered to the police; confessed to his crimes and offered to testify against a co-defendant, Mills. Id. At the sentencing hearing itself, defense counsel made an impassioned plea to spare the Defendant's life because the death penalty is immoral; because the Defendant is basically a good person and because the Defendant could serve out his years in prison. See, JA320-JA324.

Finally, it should be noted defense counsel successfully excluded the Defendant's "rap sheet". JA311-JA312.

The Florida state trial court in a detailed order sentenced the Defendant to three (3) consecutive death sentences upon a finding that there were insufficient mitigating circumstances and that ample aggravating circumstances were present in that all three murders, 1) were heinous, atrocious and cruel; 2) were committed while engaged in a violent felony and were plainly for pecuniary gain and 3) were committed to avoid arrest and to hinder the enforcement of the laws of Florida. See, §921.141(6)(d)(e)(f)(g) and (h)(1975); 362 So.2d at 662-664. The trial court additionally found that the murder of Birk was committed in such a manner that it created danger to many persons. §921.141

(5)(c); Id. On September 9, 1978, the Florida Supreme Court concurred in the trial court's views and found that there were no mitigating circumstances. 362 So.2d at 665-667. The Defendant, represented by counsel, applied to this Court for review, which was refused on April 30, 1979. Washington v. Florida, 441 U.S. 937 (1979).

On September 18, 1980, subsequent to clemency proceedings, the Defendant filed his Motions in the Florida state trial court for collateral relief under Rule 3.850 Florida Rules of Criminal Procedure claiming inter alia that his counsel was ineffective. See Exhibits, U.S.D.Ct. record. After the Defendant neglected to pursue his Rule 3.850 motion, on March 13, 1981 Governor Robert Graham of Florida signed a death warrant commanding that the Defendant be executed sometime between April 3, 1981 and noon on April

10, 1981. On March 27, 1981 after argument upon the Defendant's motion the Florida trial court entered a detailed written order relying upon the watershed opinion in Knight v. State, 394 So.2d 997 (Fla. 1981)[4]. See, A206-A243. Specifically the state trial court found that the affidavits presented little more information than the Defendant presented himself at the plea colloquy. A225. The state trial court also found that the psychiatric reports presented by the

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[4]Knight set four-step process by which a defendant's claim of ineffective assistance of counsel should be examined:

"In determining whether defendant has been provided with reasonably effective assistance of counsel, we believed the following four-step process encompassed in United States v. DeCoster (DeCoster III), 624 F.2d 196 (D.C. Cir. 1979)(en banc), provides a means to discover a true miscarriage of justice and yet does not place the judiciary in the role inter fering with defense counsel's legal and tactical conduct at trial or on appeal. We adopt the following four principles as a standard to whether an attorney has

Defendant also would have clearly established elements of the aggravating circumstances which the State was required

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(Footnote 4 cont.) provided reasonably effective assistance of counsel to his client.

"First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading."

"Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in DeCoster III: 'to be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts of omissions deviated from a checklist of standards.' 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances."

"Third, the defendant has the burden to show that this specific serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court

to prove in order to impose the death penalty. Id. Additionally, the witnesses who submitted affidavits were apparently also unaware that the Defendant did have a substantial criminal history. See, A225; JA338-JA365.

On appeal to the Supreme Court of Florida, the Court also rejected the Defendant's claims relying upon Knight v. State, opining inter alia that:

(Footnote 4 cont.) proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions."

"Fourth, in the event a defendant does show substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established. Chapman v. California, 386 U.S. 18 (1967); DeCoster III." [Emphasis added, footnote omitted]. 394 So.2d at 1000-1001.

> "To each of appellant's initial six points, the state counters with arguments that the omissions were not substantial. But even more fatal, we can find no prejudice caused to appellant, even if we assume that every allegation he has made in his petition is true. Several contentions focus on the lack of proof of appellant's good character and his emotional and economic stress just prior to the murders. But equivalent proof was indeed placed before the sentencin court by Washington himself in the guilty plea colloquy, in which he attested to his troubles and that this was his first encounter with the law, all without being subjected to cross-examination. Nor was trial counsel's failure to obtain or request a psychiatric evaluations conducted before and after sentencing failed to raise any evidence of significant mental disturbance or impairment. None of these reports raise any substantial legal or factual arguments in mitigation, and hence there could be no prejudice." 397 So.2d at 286-287.

The Florida Supreme Court concluded that, "the appellant has failed under the Knight criteria to make a prima facie showing of substantial deficiency or possible prejudice and has failed to such a degree that we believe to the point of

moral certainty, that he is entitled to no relief. . ." [Emphasis added]. Id. Specifically, with respect to the representation of counsel, the Florida Supreme Court observed that even the most zealous advocate could not have saved the Defendant from his fate:

> "The record shows that trial counsel made a respectable argument on appellant's behalf at the sentencing hearing. A confession plus numerous aggravating factors limit the alternatives of the most zealous of advocates." Id.

In the present case, the Defendant had prefiled his petition for habeas corpus in U.S. District Court on April 3, 1981. R1-R12. The Defendant's habeas petition however omitted all of the exhibits which were attached to his Rule 3.850 Petition in State Court [5]. On

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[5]The Defendant's exhibits 2 through 15 are affidavits of friends and neighbors and members of the Defendant's family,

April 7, 1981, pursuant to oral argument the U.S. District Court entered a stay pending further consideration and on April 10, 1981, the U.S. District Court over vigorous State objection conducted an evidentiary hearing. JA367-JA370.

At the evidentiary hearing below, the District Court directed that the Defendant should particularly direct his attention to a showing of prejudice. T5. The Defendant produced only one witness, his trial court counsel, Bill Tunkey.

(Footnote 5 cont.) which say that the Defendant was basically a good person and had never been in trouble with the law. See, Exhibits, U.S.D.Ct. record (JA338-JA365). Defendant's other affidavits, 16 and 17, were affidavits of a psychiatrist, Bernard, and a psychologist, Lane, who conclude that the Defendant was sane and competent at the time of the crimes and is sane and competent now. Id. (JA6-JA15). The State filed these exhibits together with the original record and other matters. The District Court accepted them as evidence without objection, See, R21-R22; JA438-JA439, and subsequently noted them in its analysis, A266-A267.

See, T2. Mr. Tunkey testified that he represented the Defendant initially on the Meli killing beginning in early October of 1976. JA372. He testified that he had been in the practice of law, and exclusively criminal law, for six and one half years prior to his appointment to represent the Defendant. JA422-JA423. He said that he began his career as a prosecutor in 1970 and entered private practice in 1973. Id. Tunkey testified that he was the trial attorney in perhaps over a thousand (1000) cases during that time (JA424) and that prior to the present case, he had been a court-appointed attorney, on over one hundred (100) cases (JA423).

In the present case, Mr. Tunkey testified that his fundamental strategy was to dilute the State's case and that he did consider in his preparation, the aggravating and mitigating circumstances

that were possible. JA374-JA377. He testified that the prosecutor permitted open file discovery:

> "[By Mr. Shapiro]: Q: How was your investigation conducted at this time?
>
> "[By Bill Tunkey]" A: Well, it was conducted primarily through the State and by that I mean the State Attorney's office was having an almost open file discovery in the Meli case and certainly when the Pridgen and the Birk's case came to pass, they were providing literally open file discovery and by that I mean police reports, which in a normal case if I asked for the, I would not probably have gotten them.
>
> "They were providing them and I was getting a complete list of witnesses and I was getting copies of all reports up until the time. . . up until I am going to say mid-November, using your date, there were active preparations being made by way of subpoenas to summon witnesses to attorneys, officers, either the Public Defender's office or the State Attorney's office, so that those witnesses might testify and give us a preview, so to speak, of what their testimony was going to be."[Emphasis added.]JA378-JA380.

Tunkey testified that he was ready to go to trial but that the State's case, in his experience, was overwhelming. JA425. He was also aware of the Defendant's prior felony record and testified that he discussed the Defendant's case with the Defendant for many hours. JA427-JA428. He was shocked when the Defendant confessed to the other murders:

> "I was particularly surprised in light of the fact that I had counseled David and that it was possible that he might be approached by detectives and someone attempting to question him and when I discovered that he had almost initiated the contact with the detectives and had specifically on the record been advised that he had a right to have an attorney there and even mentioned the fact that he had a right to have me there by name, he waived those rights. . .[Emphasis added]. JA382-JA383.

Mr. Tunkey explained that the Defendant's choice to plead guilty was entirely

against his advice, but consistent with the Defendant's conduct regarding in the two subsequent confessions. JA387. He explained that the Defendant, against his best advice, had chosen to confess; to plead guilty and to waive any jury hearing on sentencing. JA399-JA401.

With respect to any issue of continuing the sentencing proceeding, Tunkey testified that the Defendant wanted to get it over with. T60. Tunkey tentatively testified that the Defendant did not want anyone at the sentencing proceeding. JA408. Tunkey explained that he had in fact, earlier in the case, requested a continuance of the Meli case because he did not want the Meli conviction to be used to enhance the penalty for the Birk and Pridgen murders (T32-T34), but that he saw no reason to continue the sentencing proceeding (T60). The

Defendant did not indicate any witnesses that he wanted for the sentencing phase. JA427-JA428. Prior to the Defendant's insistence on confessing and pleading guilty, Tunkey had endeavored to investigate the Defendant's background. JA387-JA390. As for example he explained that the Defendant's girlfriend or wife and his mother were repeatedly contacted, but never kept appointments to discuss the case. Id. Tunkey also said that he was aware of the Defendant's financial difficulties, but that the Defendant never mentioned any abuse as a child. Id.; JA428.

After the destruction of the case by his own client, Tunkey explained that, because of his personal familiarity with the trial judge that he believed that the central strategy for the Defendant in the grim posture of the case was to

personally demonstrate clear and genuine remorse, as non-statutory mitigation:

> "Q: At that point in time, what was your strategy for the sentencing phase?
>
> "A: Among other things and certainly one of the few things which I took into account as an attorney, which I can't say I discussed with David, but I took into account simply from the familiarity with the trial judge, Richard Fuller, was that he, being the trial judge, respected any individual who had been accused of a crime and who, in fact, was guilty of a crime and who came before him and admitted his guilt.
>
> "To myself, I certainly thought if David had any chance at all, [and I am really getting subjective,] in front of this particular Judge, on these particular facts for these particular kind of crimes, that the one shot he perhaps had was the fact that he genuinely was coming before the Court and admitting his guilt, unlike some defendants who come in and plead guilty to avoid a harsher punishment.
>
> "I really felt that Judge Fuller knew this was not such a ploy by Washington and based upon that and

my subjective analysis of Judge Fuller at that time at that stage of his career as a Judge, I felt that perhaps the strongest point that David had to save himself from the electric chair, and I can't say that this was fully discussed between David and I, but the thought went through my mind, keeping in mind the mitigating factors whichthe statute set forth at that time and some had already been put on the record as far as the testimony on December 1st is concerned from David himself, but I went through all of the aggravating and mitigating circumstances which the statute described and I was familiar with all the cases to that point that had been ruled upon the statute and various aspects of it, and I felt that one of the mitigating circumstances ought to be the fact that he was pleading guilty.

"I really could find very little to address myself to in terms of a relevant, cogent presentation of mitigating circumstances as outlined by the statute itself and certainly insofar as aggravating circumstances are concerned, I did not feel exactly like I had sufficient ammunition to persuade anybody that

> the State was not going to succeed in showing at least that they outweighed the mitigating circumstances.
>
> "I felt it was more of a legal argument at that point as far as the aggravating circumstances were concerned." [Emphasis added].JA401-JA404.

In view of the circumstances of the case, Tunkey considered that a showing of remorse was a critical factor:

> "Q: Do you think that Judge Fuller would have been concerned about a defendant's remorse?
>
> "A: Oh, yes, I think that was all part and parcel of David's attitude in court and also to me out of court. That is why I had the strong feeling that this was the most important thing he had going for him." JA407-JA408.

Mr. Tunkey also clearly explained that from his strategy standpoint, he firmly believed that the Defendant was the evidence of his own remorse and that family members would have been superfluous to the genuineness of the Defendant's

remorse, which he was trying to present and intimated that Judge Fuller may have reacted to such additional witnesses as "phony":

> "[By Mr. Fox]: Q: Mr. Tunkey, why didn't you produce anyone from the defendant's family at the time of sentencing to demonstrate his remorse?
>
> "A: First of all, I had trouble getting in touch with them, but assuming I could have gotten in touch with them, but the remorse that was shown, I assume it would have been shown in jail since he was not any place but jail from the day of his arrest until the sentencing of the 6th of December.
>
> "I also thought it would have been superfluous because the remorse that David exhibited to me in court was of sufficient quality and quantity that it was obvious, to me anyway, and I thought to the trial Judge, that it was completely sincere, that it was not something that was phonied up, and if you will, to try to get a life sentence. In a rather ingenuous point at a hearing, I don't know which one, David expressed the thought that it probably be better to be sentenced to death than to rot in jail for the rest of his life.

> "Now, regardless of whether that was a request for a death sentence which I don't think it was, but regardless of what connotation you give to that statement, the statement itself I thought showed the truthfulness, ingenuousness of the person, that he was really sincerely sorry for what he had done. There were times that he, even though tears which is not on the record, exhibited his true remorse for what had occurred and I would certainly say that he was honestly remorseful for everything that he was charged with." [Emphasis added] JA429-JA430.

Tunkey affirmatively explained that he believed that there were also nothing from the Defendant's background, which would have swayed the Court from the aggravating circumstances. JA419. see also, JA432. To the contrary, Mr. Tunkey considered that the Defendant's background, as would have been revealed in a presentence investigation, would have been harmful to the Defendant. JA405-JA406. Similarly, Tunkey also explained that the presence of a psychiatric report was a two-edged sword

and that he considered and rejected the idea, because they would have only revealed that the crimes were for pecuniary gain. JA417-JA418; see, also, JA432-JA433. Mr. Tunkey specifically explained to the Court that the Defendant had expressed a clear understanding of the crimes and that the Defendant had indicated that the crimes were committed for pecuniary gain. JA415. Tunkey explained that based upon his extensive experience and knowledge of the case and communication with the Defendant, he did not believe a psychiatric report would therefore be helpful and that he felt he may have or may not have seen the report of Dr. Jacobson [6]. Tunkey subsequently

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[6]Dr. Jacobson's report was originally ordered and received by the magistrate, Judge John Tanksley, who first arraigned the Defendant. See, T190-T192. Dr. Jacobson's report indicates that there was no evidence of any psychosis on the

Tunkey subsequently examined the reports of Dr. Lane and Dr. Bernard[7] and expressed the view that the reports indeed verified his own belief that the Defendant was sane and added nothing to mitigation in the case. T61-T63. The State called Mr. Tunkey as its own witness, when the Defendant failed to

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(Footnote 6 cont.) part of the Defendant, and that there was nothing which would indicate that the Defendant was suffering from any major mental illness at the time of the offense. See, JA1-JA5; R21-R22; JA438.

[7]The reports of Doctor's Lane and Bernard were procured by the Defendant and submitted as exhibits 16 and 17 to his state motion to vacate. See, Exhibits (JA6-JA15); JA438-JA439. In Exhibit 16, Psychologist Lane states that he examined the Defendant on March 19, 1980, and found that there was no evidence to support the view that the defendant was legally insane or, psychiatrically-speaking, psychotic at the times of the crimes. JA13-JA14. The report of the Psychiatrist George W. Bernard states that he interviewed the Defendant on May 10, 1980 and he finds no indication of psychosis. Furthermore, he specifically states:

inquire as to the issue of cross-examination of medical examiners. Mr. Tunkey explained that he saw nothing to be gained and that vigorous cross-examination could very well have been devastating to the Defendant. T64-T65.

The State called Judge Richard S. Fuller as its witness. Judge Fuller testified as to his extensive qualifications and was accepted as an expert witness by the Court without objection. See, JA443-JA445. Judge Fuller testified that he appointed Mr. Tunkey on October 6, 1976 to represent the Defendant. JA446

(Footnote 7 cont.)

"It is my medical opinion that, at the time these capital felonies were committed, while [the Defendant] was not under the influence of extreme mental or emotional disturbance, he was chronically frustrated and depressed because of his economic dilemma wherein he was unable to find employment and provide for his wife and children." [Emphasis added]. JA7

Judge Fuller indicated that he was thoroughly familiar with Mr. Tunkey's qualifications and considered him to be among the better part of the criminal bar, with an impeccable reputation:

> "Q: Did you have an opinion as to Mr. Tunkey's reputation then?
>
> A: Bill Tunkey at that time and today has a reputation that I thought was impeccable. He worked hard. He did not ex parte judges, tried his cases as they should be tried and unlike other lawyers, did not argue unless he though something was wrong or amiss. He was there when he was supposed to be and I wish I could have used him more. But obviously it would have not been proper." [Emphasis added]. JA446-JA448.

Judge Fuller testified, that the case had proceeded in a prompt and orderly fashion prior to the plea herein and that he had no reason whatsoever to question Mr. Tunkey's handling of the case. JA449.

With respect to the plea, Judge Fuller testified that in his experience and view of the case, the Defendant had

decided to plead guilty despite the efforts of his attorney. JA450-JA451. Judge Fuller specifically indicated that he had formed no opinion as to the penalty at that point. JA452. Judge Fuller testified that he was familiar with the Defendant's background and his employment and family problems. JA453. Fuller indicated that he conducted an extensive plea colloquy to be certain the Defendant knew the possible consequences of his plea. JA450-JA455. The sentencing proceeding was set to begin a few days later on December 6, 1976, which was not unusual and if anything was a little longer period after the plea than was normally the case. JA455. Judge Fuller testified that Mr. Tunkey's presentation in the sentencing proceeding, was effective. JA455-JA456. He said that Tunkey did nothing which was inconsistent with

what Judge Fuller thought should be done. JA465. He indicated that the Defendant himself provided "in good part" the circumstances of his family background. JA468. Finally, Judge Fuller testified that he wrote his own orders; that he had considered various non-statutory factors in mitigation, but that he would impose the same sentence today:

> "[By Mr. Fox] Q: In your sentencing order, Judge, you find no statutory mitigation, but it states that there was insufficient mitigation. Can you explain that?
>
> "A: As I remember the facts, Mr. Fox, of the enumerated group of mitigating circumstances, there were none and maybe my English wasn't appropriate because I wrote my own orders and I didn't ask the State Attorney to prepare these, I had considered his age, his family, the things he told me, his candor with the Court and I considered the authority, that his admission had been given and to me anybody that would get up in public and say they have done something wrong, gets a lot of stripes on his side.
>
> "I think that is the first step and I was particularly pleased that he took this position, although not

enumerated by the Court, but it didn't add enough weight from the position where I thought I should be, to impose the death penalty which, of course, I did not get any pleasure from.

"It was an awful case. He was a very pleasant young man but after reviewing the record as I did last night, I would impose the same sentence today." JA458-JA460.

Judge Fuller explained that he had examined the Defendant's Rule 3.850 motion and its exhibits and even if the Defendant's witnesses were the best witnesses in the world their testimony would not and could not change his view that this is a death penalty case:

"A: . . . Were I to have the folks that were good enough to give affidavits before me in court and heard their testimony and it was consistent with the contents of their affidavits and were these people to have been the best witnesses that I have ever seen and were they to be the most believable people that I have ever seen and I assessed them as the best from a demeanor point of view and everything else, that information would not have changed my opinion then

nor would it have changed my sentencing were I to give it today.

"Inasmuch as what David Washington told me himself at the time of his plea or at the time of the sentencing, the economic problems that he had, all about dollars and cents, problems with his family, perhaps problems with his step-father, most people who have found themselves in those circumstances, unfortunately have a rather depressing background.

"I recognized that and I had a great deal of thought about David Washington, but the extensive amount of circumstances in this case, and six that are of an aggravating nature just outweigh everything else and I don't think any other judge that had the same facts in front of him today or at the time would have made a different decision.

"I have labored over this and it is, in fact, correct if, in fact, there is a death penalty, then this is a death penalty case.

"[Mr. Fox]: No further questions."

JA461-JA463.

Judge further elucidated his answer on cross-examination:

> "This is a capital case and I could put all those things in a great big thing in front of me, write them all down and do all kinds of stuff, but it comes out the same. He has got a terrible background. I felt terrible that people in our community have to live like he did. There were bad problems with his family, supporting his family, but that wasn't enough of a mitigating circumstance to the extent that it would outweigh the aggravating circumstances that I enumerated which must have been five or six in each case. These were heinous crimes." JA484.

On April 15, 1981, the United States District Court entered a twenty page order rejecting the Defendant's Petition for Writ of Habeas Corpus. See, A252-A295. Although the District Court was critical of defense counsel's tactical choice not to investigate certain aspects of the Defendant's background, the court did not conclude that defense counsel was ineffective.

See, A283, n. 3. To the contrary, the District Court, like the Supreme Court of Florida and the Florida state trial court before it, noted the overwhelming nature of the State's evidence and the circumstances facing Tunkey, the defense counsel:

> "The fact of Washington's voluntary, detailed confessions to multiple crimes is extremely unusual, and according to the testimony during the hearing, rarely occurs in capital cases. To suggest that Mr. Tunkey failed to make the necessary investigation is not to impugn his general qualifications. By all accounts, he is an was a competent, experienced criminal attorney, who in the Washington case, was faced with a unique and potentially overwhelming situation." A280-A281.

Relying upon the standard of review in United States v. DeCoster, 634 F.2d 196 (D.C. Cir. 1979)(en banc) and Knight v. State, supra, the United States District Court found inter alia that the Defendant had not been prejudiced in any way

whatsoever by Mr. Tunkey's actions or inactions. A282-A283. In reviewing the affidavits and "new evidence" proposed by the Defendant, the United States District Court concluded that:

> "[R]eviewing the proposed character and psychiatric testimony, and weighing it against the detailed record of petitioner's conduct in initiating and carrying out three separate episodes of planned robbery, kidnapping and murder, there does not appear to be a likelihood, or even a significant possibility that the balancing of aggravating against mitigating circumstances under the Florida death penalty statute would have been altered in petitioner's favor. Critically, the character and medical testimony cannot reasonably be characterized as evidence of extreme mental or emotional disturbance. Nor does it provide persuasive rationalization for petitioner's extended and calculated course of violence. Therefore, it is my determination on the critical legal issue, that petitioner was not prejudiced by the inaction which did occur, and was not denied his Constitutional right to effective assistance of counsel, as that standard is defined under present case law." [Emphasis added]. Id.

Subsequently, the Defendant filed his Notice of Appeal[8]. JA509. The State subsequently filed a Notice of Cross-Appeal, in order to challenge specifically on appeal: 1) Whether a hearing was required at all in the face of the record; 2) Whether defense counsel was ineffective; and 3) the specific rejection of the State's claim that the Defendant had abused the Writ[9]. JA510. The panel of the Eleventh Circuit in a sharply divided opinion, rejected both Knight and DeCoster and reversed holding that all a defendant need show to establish ineffective assistance of counsel,

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[8]When the U.S. District Court vacated its stay, the State in Strickland v. Washington, U.S. Sup. Ct. Case No. A-909, unsuccessfully attempted to have this court vacate the subsequent stay imposed by the Eleventh Circuit.

[9]The en banc court erroneously considered that the State's cross-appeal addressed only the question of the abuse of the Writ. 693 F.2d at 1264, n.34 (A168).

is that evidence was omitted which might be "helpful to him."Washington v. Strickland, 673 F.2d 879, at 901-902 (5th Cir. 1982). The panel opinion further held that the state trial judge's testimony as an expert witness was not admissible under Fayerweather v. Ritch, 195 U.S. 276 (1904). The panel reasoned that Judge Fuller was impeaching his prior verdict. See, 673 F.2d at 902-906.

On May 14, 1982, the Eleventh Circuit sua sponte vacated the panel opinion and ordered a rehearing en banc. 679 F.2d 23 (5th Cir. 1982). Upon en banc rehearing the Eleventh Circuit expressly rejected United States v. DeCoster, supra (693 F.2d at 1261) and "[struck] down the Florida Supreme Court's standard for reviewing the ineffective assistance of counsel claims set forth in Knight v. State . . ." 693

F.2d 1287; 1248 at n 5. The Court held: 1) that the district court had failed to properly consider the claim that Tunkey was ineffective because he failed to investigate the case; 2) that the court had improperly allocated the burden of proof to the Defendant and 3) that the testimony of Judge Fuller that the new evidence presented by the Defendant would not make any difference in his sentences, was improperly admitted. Id. at 1248-1264.

With regard to the first ground, the Eleventh Circuit concocted a convoluted "list" of various combinations of the duty to investigate which the District Court must apply to determine whether Tunkey was ineffective. Id at 1251-1258. With respect to the second issue, the en banc court relied upon the first half of the test in United States v. Frady, __ U.S.____, 102 S.Ct. 1584 (1982), holding

that a defendant must only show that his claim of error, "worked to his actual and substantial disadvantage." Id. at 1258. In analyzing the second issue, the Eleventh Circuit noted that the Supreme Court of Florida in Knight had specifically relied upon the rule in DeCoster. Id. The Eleventh Circuit specifically rejected the rule in DeCoster. Id; 1261-1262. The court decided instead that a defendant need only show by a preponderance of the evidence that he suffered actual prejudice from the claimed deficiency of his counsel, but not that it affected the outcome of the case in any manner whatsoever. Id. at 1258-1262.

With regard to the third issue, citing Fayerweather v. Ritch, 195 U.S. 276 (1904), the court held that the testimony of Judge Fuller was incompetent because it constituted impeachment

of Judge Fuller's prior verdict. Id, at 1262-1263. The court reasoned that Judge Fuller could not consider the affect of any offered new evidence upon his previous judgment imposing the death penalty. Id.

In sum, the en banc court ruled that a defendant may overturn his conviction, which was accomplished by proof beyond reasonable doubt, by a mere preponderance of evidence upon collateral claims. The State can then only rebut such a showing by proof beyond a reasonable doubt that a defendant's claims did not affect the outcome of the case. The State is however precluded from presenting the trial judge, who is the best evidence of its "proof beyond a reasonable doubt." At the same time, a defendant's proof by a mere preponderance of the evidence, may be accomplished by demonstrating any

combination from a "laundry list" of errors approved by the court.

The three dissenting judges vigorously concluded that Tunkey was not even remotely ineffective. Id, at 1285-1287. The dissent further observed that the majority opinion is an exercise in sematics contrary to the duty of the federal courts under the habeas corpus statutes and contrary to the reality of the evidence in the present case. Id, at 1287. The dissent finally complained that the majority was engaging in an exercise in futility inasmuch as the matter had already been extended through protracted litigation and the papers presently before the court did not demonstrate in any way whatsoever, "that any other strategy would have had any likelihood of dissuading the [State Court] judge from imposing the death penalty." [Emphasis added] Id.

Neither the State nor the Defendant sought a rehearing upon the en banc rehearing opinion. The present decision has, however, been stayed pending review in this Court. Subsequently, on January 20, 1983, in Sampson v. Armstrong, 429 So.2d 287 (Fla. 1983)(A195-A324), the Florida Supreme Court expressly acknowledged the Eleventh Circuit's opinion herein but declined to follow it. Instead, the Florida Supreme Court reaffirmed its view that Knight is "constitutionally correct."

V

SUMMARY OF ARGUMENT

1.) An evidentiary hearing in the present cause was not necessary where the issues are patently without merit upon the face of the record. The Defendant confessed to three brutal murders, which were committed in one ten-day period and pleaded guilty. The Defendant does not challenge the plea of guilty. The Defendant only challenges his sentence of death. If there is a death penalty case, this, "to a moral certainty" is a death penalty case. The Defendant's sentence has been reviewed and affirmed twice on appeal by the Florida Supreme Court and three times by three other separate courts of competent jurisdiction. There is neither authority nor cause for the Eleventh Circuit to intrude into the State sentencing process.

2.) The Eleventh Circuit's analysis of

claims of ineffective assistance of counsel relying upon a proposed "laundry list of errors," flys into the face of Gideon and its progeny. The proper focus of any claim of ineffective assistance of counsel is not upon a list of potential omissions, but rather upon whether a defendant received a fundamentally fair trial within the meaning of the Fourteenth Amendment.

3.) The Eleventh Circuit has improperly allocated the burden of proof and the degree of proof required for a prima facia claim in collateral proceedings.

4.) The Eleventh Circuit has improperly applied United States v. Frady, __ U.S. _ _, 102 S.Ct. 1584, (1982). The court's opinion only applies the first part of the test explained in Frady that a defendant must show that the errors he complained of, "worked to his actual and substantial disadvantage." Frady

consistent with Knight and DeCoster, also holds that a defendant must show that these errors were such that they, "infect[ed] his entire trial with error of constitutional dimension."

5.) The testimony of the State trial judge, Richard Fuller, was properly admitted without an articulate objection as an expert by both parties and the court. Judge Fuller's testimony was also properly admitted consistent with, settled substantive and statutory authority and judicial analysis and evaluation of new evidence of any nature under United States v. Agurs, 427 U.S. 97 (1976). The Eleventh Circuit has completely misapplied and erroneously interpreted Fayerweather v. Ritch, 195 U.S. 276 (1904). If Fayerweather does stand for the proposition which the court claims, it must be overruled.

VI

ARGUMENT

1) SUBSTANTIAL DEPARTURE FROM ACCEPTED OR USUAL COURSE OF JUDICIAL PROCEEDINGS.

Washington's attack upon his sentence is frivolous. Though the penalty herein is death, yet another extraordinary review of that penalty is not the function of the habeas corpus writ or this Court and its inferior courts. The Eleventh Circuit in this cause and others[10] has permitted defen-fendants to drag the federal courts into the substantive state sentencing process.

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[10]In Proffitt v. Wainwright, 685 F.2d 1227, at 1262, n 54 (11th Cir. 1982), cert. pending, U.S. Sup.Ct. Case No. 83-113, the Court expressly repudiated the principle explained in Spenkellink and applied in Barclay, Stephens and Barefoot:

> "In view of Godfrey, we can only conclude that the language in the Spinkellink opinion precluding federal courts from reviewing state courts' application of capital sentencing criteria is no longer sound precedent."

Compare, Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983); Zant v. Stephens, _ U.S.__, 103 S.Ct. 2733 (1983); see, also, Barefoot v. Estelle, ___U.S. __, 103 S.Ct. 3383 (1983); Spinkellink v. Wainwright, 578 F.2d 582 at 613-614 (5th Cir. 1978), cert.den. 440 U.S. 976 (1979). Although the present sentence has been reviewed by four state courts of competent jurisdiction, the Eleventh Circuit has totally ignored the state court's review under the guise that the major issue, competency of trial counsel, presents a "mixed question of law and fact." The only inquiry should have been whether the proceeding below was fundamentally fair. See, Discussion at pp. 67-81. It was and therefore under Barclay, Zant, and Barefoot there is neither authority nor cause to review the present sentence further.

The Defendant's claims should have been rejected on the face of the record without any requirement of an evidentiary hearing. See, e.g., Parker v. North Carolina, 397 U.S. 790 (1970)(record refutes the defendant's allegations); Chambers v. Maroney, 399 U.S. 42 at 53-54 (1970)(same). The Defendant was convicted and sentenced to death on December 6, 1976. He did not complain about his trial attorney until September 19, 1980, in response to clemency proceedings. The Defendant confessed to three (3) of the most brutal murders in Florida's history and pleaded guilty. In the words of the Florida Supreme Court, "the atrocity of the episode cannot be gainsaid." 362 So.2d at 665. The Defendant has not raised any issue as to his or guilt or challenged his pleas of guilty. The Defendant only assails the propriety of his sentence, by suggesting

that his attorney did not produce additional cumulative, amorphous evidence of non-statutory mitigation[11]. The Defendant's challenge to his sentence is specious.

A federal court's intrusion into a state's capital sentencing process is warranted where a defendant can plainly show, "that the facts and circumstances of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience." Spenkellink v. Wainwright, 548 F.2d at 606 n. 28. Such is not even remotely the situation in the

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[11]Upon a new sentencing proceeding the State would, however, also have the opportunity to show an additional statutory aggravating circumstance under Section 921.141(5)(b) Florida Statutes (1977) which was erroneously by excluded by the trial court because of defense counsel's efforts. See, A216-A217 (state trial court order denying collateral relief).

case at bar as is evident upon the face of the record. As the dissent below observed, if there is a death penalty then this is a death penalty case[12] and further proceedings are "a fruitless prolongation of an already protracted litigation." 693 F.2d at 1287.

As noted, contrary to Sumner v. Mata, 449 U.S. 539 (1981) and Townsend v. Sain, 372 U.S. 293 (1963), neither the District court nor the Eleventh Circuit

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[12]See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spenkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. den. 440 U.S. 976 (1978); State v. Dixon, 283 So.2d 1 (Fla. 1973)("when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence"); compare, e.g. Straight v. State, 397 So.2d 903 (Fla. 1981)(no statutory mitigation); Booker v. State, 397 So.2d 910 (Fla. 1981)(no statutory mitigation); Ruffin v. State, 397 So.2d 227 (Fla. 1981); Peek v. State, 395 So.2d 492 (Fla. 1981)(same); Thompson v. State, 389 So.2d 197 (Fla. 1980); Antone v. State, 382 So.2d 1205 (Fla. 1980); Ford v.

has given any substantive consideration to the presumptively valid determinations by both the Supreme Court of Florida and the State trial court that Tunkey was not ineffective on the face of the record. The state courts applied the proper standard of "fundamental fairness" (see, Discussion infra at pp. 67-81) and their determinations are soundly supported by a competent record which should not have been disturbed. See, Jackson v. Virginia, 443 U.S. 307 (1979); Sumner v. Mata, supra. The federal courts discarded these

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(Footnote 12 cont.) State, 374 So.2d 496 (Fla. 1979); Fleming v. State, 374 So.2d 954 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1979; Gibson v. State, 351 So.2d 948, at 951 (Fla. 1977)(no mitigating, three (3) aggravating); LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978)(no mitigating); Jackson v. State, 359 So.2d 1190 (Fla. 1978)(no mitigating) Darden v. State, 329 So.2d 287 (Fla. 1976)(no mitigating); Douglas v. State, 328 So.2d 18 (Fla. 1976)(no mitigating); Sullivan v. State, 303 So.2d 632 (Fla. 1974)(Overton, J. concurring).

carefully considered opinions by totally ignoring them. See, Sumner v. Mata. Should a state judgment be set aside simply because a federal court disagrees or is not in philosophical accord with a state judgment or sentence, under the guise of calling it "a mixed question of law and fact" and then improperly decides the issue de novo[13]? Or are federal courts going to be bound by a standard which restores some semblence of integrity to state court judgments[14]? Sumner v. Mata; Townsend v. Sain, and the application of the proper standard of

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[13]See, e.g., Pullman-Standard v. Swint, U.S.___, 102 S.Ct. 1781, at 1789-1791 (1982).

[14]See, Donnelly v. DeChristoforo, 416 U.S. 637 (1974)(federal court review of state court conviction process is not under its supervisory powers); Marshall v. Lonberger, ___U.S.___, 103 S.Ct. 843 (1983)(the "fairly supported by the record" requirement does not permit a federal court to reweigh the facts surrounding a state court judgment).

review discussed below, require affirmance on the face of the record.

2) STANDARD FOR REVIEW FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The central analysis in the present cause is the nature and source of the right to counsel afforded by the Sixth Amendment. The Eleventh Circuit requires that we descend into an endless labyrinth of assertions of ineffective counsel by the bootstrap of hindsight, focusing not upon what counsel did, but rather upon a list of what he did not do. The proper analysis is predicated upon fundamental due process and thus focuses upon what counsel did and whether a defendant has been denied, "a fundamental right essential to a fair trial," in the context of the entire proceeding. See, Gideon v. Wainwright, 372 U.S. 335, at 339-344 (1963).

The Sixth Amendment provides only that, "the accused shall enjoy the right . . .to have the assistance of counsel for his defense." No statement is made as to the quantity or quality of "counsel" constitutionally required. Indeed, in Scott v. Illinois, 440 U.S. 367, at 370 (1979) the Court remarked that, "[t]here is considerable doubt that the Sixth amendment itself as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of the accused in a criminal prosecution * * * to employ a lawyer to assist in his defense." See, also, Powell v. Alabama, 297 U.S. 45 at 69-70 (1932)(the fundamental right to counsel requires the presence of counsel to assist in defense). In Gideon v. Wainwright, the Court affirmed the historial analysis in Betts v. Brady, 316 U.S. 455 (1942) that

the Bill of Rights are fundamental safeguards, which find application to the states only through the due process clause of the Fourteenth Amendment. 372 U.S. at 342-341. The Gideon court noted that the defendant's claim was therefore whether he had been, "denied the right to assistance of counsel in violation of the Fourteenth Amendment," 372 U.S. at 339, and whether the right to counsel was, "'fundamental and essential to a fair trial' [and] made obligatory upon the States by the Fourteenth Amendment." See, 372 U.S. at 342. The Gideon court concluded that the due process clause of the Fourteenth Amendment required the application of the Sixth Amendment right to counsel to the States. Cf. also, Mapp v. Ohio, 367 U.S. 643 (1961). As an essential premise to its analysis the Court noted that in any due process

inquiry the concern is whether in the totality of the circumstances the proceeding was fundamentally unfair:

> "Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." [Emphasis added]. 372 U.S. at 339 quoting Betts v. Brady, 316 U.S. at 462 with approval.

An unbroken line of decisions by the Court has thus focused upon the fundamental denial of due process in the complete absence of counsel or in critical circumstances tantamount to the total denial of counsel[15].

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[15]See, Powell v. Alabama, supra, (ability to confer); Avery v. Alabama, 308 U.S. 444 (1940)(ability to confer); Ferguson v. Georgia, 365 U.S. 570 (1961) (no direct examination of defendant); Hamilton v. Alabama, 368 U.S. 52 (1961) (no counsel at guilty plea); White v. Maryland, 373 U.S. 59 (1963)(same);

Indeed, this Court has more recently held, that the central consideration upon ineffective counsel claims is whether a defendant has been denied fundamental due process and a fundamentally fair trial. See, United States v. Frady, ___U.S.__ , 102 S.Ct. 1584 (1982); Engle v. Isaac, __ U.S.___, 102 S.Ct. 1558 (1982)[16].

The focus upon the fundamental nature of the right to counsel rather than laboring over a "laundry list" of things counsel might have done is consistent with the proper application

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(Footnote 15 cont.) Geders v. United States, 425 U.S. 80 (1970)(consultation with defendant); Brooks v. Tennessee, 406 U.S. 605 (1972) (defendant required to testify as first defense witness); Herring v. New York, 422 U.S. 853 (1975)(denial of closing argument); Faretta v. California, 422 U.S. 806 (1975)(no consent to counsel); Holloway v. Arkansas, 435 U.S. 475 (1978) (conflict of interest); Cuyler v. Sullivan, 446 U.S. 335 (1980)(same).

[16]See, also, Henderson v. Kibbe, 431 U.S. 145 (1977); United States v. Agurs, 427 U.S. 97 (1976); Cupp v. McNaugten, 414 U.S. 141, at 146 (1975) ("Before a

of the great writ and is essential to finality[17]. See, also, Discussion, at pp. 85-90. "A criminal trial concentrates society's resources at one 'time and place in order to decide within the limits of human fallibility, the question of guilt or innocence.'" Engle v. Isaac, 102

(Footnote 16 cont.) Federal Court may overturn a conviction resulting from a state trial. .it must be established not merely that the [State's action] is undesirable, erroneous; or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the XIV Amendment"); Darcy v. Handy, 351 U.S. 454 at 462-463 (1956); see, also, Rose v. Lundy, ___ U.S. ___, 102 S.Ct. 1198 at 1216 (1982) (Stevens, J., dissenting; the purpose of the writ is to address fundamental unfairness).

[17]This Court has already made a pronouncement in Wainwright v. Sykes, 433 U.S. 72 (1977) discounting constitutional claims predicated upon lists of omissions by counsel. The present analysis by the Eleventh Circuit allows claims barred by Sykes to be raised routinely under the guise of "effective assistance of counsel." Thus the "cause and prejudice" requirement under Sykes, a cornerstone of habeas corpus analysis, is totally abrogated.

S.Ct. at 1571. "Every trial presents a myriad of possible claims." Id., at 1574. It is therefore inevitable that counsel will through strategy, ignorance, mistake or many other reasons choose to omit certain claims while pursuing others. Id., at 1572, n 34; 1574-1575. The Constitution therefore does not and could not require that counsel recognize and raise every conceivable claim. Id.; Wainwright v. Sykes, 433 U.S. 72 at 91 (1977); Estelle v. Williams, 425 U.S. 501 at 512-513 (1976). In United States v. Hasting, __U.S.____, 103 S.Ct. 1974, at 1980 (1983), the Court observed that, "taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial and that the Constitution does not guarantee such a trial." Due regard for finality supposes that a criminal trial must not be followed by a

trial of a defendant's lawyer. See, Wainwright v. Sykes, 433 U.S. at 114 n 13 (Brennan, J., dissenting); see, also Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoner,"76 Harv.L.Rev. 741 (1963). Such a practice, "degrades the prominence of the trial itself[18]. Engle, 102 S.Ct. at

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[18]Additionally, part of the motivation for the analysis in Knight and DeCoster is that unduly intrusive scrutiny of defense strategy in the course of considering a post-conviction claim of ineffective assistance of counsel could dampen the ardor of the defense bar and require a potentially unseemly probing of the relationship and communications between attorney and client, thereby undermining the sense of mutual trust in criminal cases generally. See, United States v. DeCoster, 624 F.2d at 208-209; Id., 228-229 (MacKinnon, J. concurring); Knight v. State, 394 So.2d at 1001, cf., Polk County v. Dodson, 454 U.S. 312 at 324, n 17 (1981). "The effect on the [defense bar] would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Upjohn Co. v. United States, 449 U.S. 383, 398 (1981), quoting Hickman v. Taylor, 329 U.S. 495, 510-511 (1947). Indeed, in the present case Mr. Tunkey was visibly distressed about testifying "against" his former client.

1571. Moreover, the underlying purpose of the habeas corpus writ is, "a bulwark against convictions that violate 'fundamental fairness.'"[Emphasis added] Engle v. Isaac, 102 S.Ct. at 1570, see, also,

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(Footnote 18 cont.) Such inquiries also undermine the constitutionally required independence of defense counsel, see, Polk County, 454 U.S. ___, at 318-319, 321-322; Estelle v. Williams, supra, 425 U.S. at 512, by inducing courts and prosecutors to oversee and second-guess judgments by defense counsel in order to protect the conviction from later attack on the basis of ineffective assistance of counsel. DeCoster, 624 F.2d at 208 (plurality, opinion); Id. at 228-229 (MacKinnon, J. concurring); Bines "Remedying Ineffective Representation in Criminal Cases: Departure From Habeas Corpus," 59 Va.L.Rev. 927, 961 (1973); see also Schwarzer, "Dealing With Incompetent Counsel--The Trial Judge's Role" 93 Harv. L.Rev. 633, 650 (1980). However, at least one judicial commentatory has suggested wholesale intrusion by the judiciary in ongoing proceedings to assure effective assistance of counsel. See, Schwarzer, J., "From the Bench: Assuring Effective Assistance of Counsel, 7 ABA J. of Litigation 5 (1981); see also, Schwarzer, "Dealing with Incompetent Counsel," supra, at 651-665; Note: "A Functional Analysis of the Effective Assistance of Counsel," 80 Colum.L.Rev. 1053, 1069 (1980).

Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,"38 U. Chi.L.Rev. 142 (1970). The reexamination of counsel's performance must therefore rest upon only fundamental fairness and not upon a list of potential errors[19].

In the present case, the Eleventh Circuit has based its analysis of ineffective assistance of counsel claims upon the "laundry list" of errors theory of ineffective assistance of counsel as proposed by Judge Bazelon in "DeCoster I"[20] and "DeCoster II"[21], which was

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[19]This analysis is also compatible with the original purpose of the writ at common law to correct only fundamental error. See, Ex Parte Bollman, 8 U.S. (4 Cranch) 75, at 95 (1807)(Marshall, C.J.); J. Story, Commentaries on the Constitution of the United States, 157 (1883); McFeely, "The Historical Development of Habeas Corpus," 30 S.W.L.J. 585 (1976).

[20]United States v. DeCoster, 487 F.2d 1196 (D.C. Cir. 1973).

[21]United States v. DeCoster, 624 F.2d 300 (D.C. Cir. 1976).

specifically rejected by the en banc court in DeCoster III. See, also, Darcy v. Handy, 351 U.S. 454 at 462-463 (1956) (merely because counsel did not complete a list of things he could do does not establish error in the constitutional sense). Contrary to the present decision, but consistent with Gideon and its progeny, DeCoster, Knight and the "farce and mockery" decisions[22] continue to focus upon whether counsel was "constitutionally adequate" and thus whether a defendant has been denied a fundamentally fair trial and thus fundamental due process. See, e.g. Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62, at 65

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[22]See, e.g. United States v. Williams, 575 F.2d 388 at 393 (2d Cir. 1978); United States v. Wight, 176 F.2d 376, at 379 (2d Cir. 1949), cert. den., 338 U.S. 950 (1950); United States v. Ramirez, 535 F.2d 125, at 129 (1st Cir. 1976).

(2d Cir. 1976)[citing Gideon v. Wainwright, 372 U.S. 335 (1963)].

The "laundry list" of errors theory of reviewing ineffective assistance of counsel claims derives from unwarranted extrapolation of McMann v. Richardson, 397 U.S. 759 (1960). In considering only the validity of a guilty plea following a coerced confession, the McMann Court in obiter dicta observed that counsel's advice to plead guilty should be viewed as to whether the advice, "was within the range of competency demanded of attorneys at criminal cases." Without guidance from this Court, various courts[23] have extended the McMann "standard" to all

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[23]See, e.g., United States v. Bosch, 584 F.2d 1113, at 1121 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540, at 543 (4th Cir. 1977)(en banc); Moore v. United States, 432 F.2d 730, at 736 n. 25 (3d Cir. 1976)(en banc); see, also, Washington v. Strickland, 693 F.2d at 1250.

Sixth Amendment ineffective assistance claims in general and have affirmatively abandoned any fair trial/fundamental due process analysis, in favor of a labyrinth of lists and a mush of semantics conceived in the serenity of the appellate process[24]. As for example,

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[24]See, e.g., United States v. Bosch, supra at n. ("reasonably competent assistance" standard is "shorthand" for "assistance within the range of competence expected of attorneys in criminal cases."; Moore v. United States, 432 F.2d 730 at 735-738 (3d Cir. 1970)(counsel must exercise, "the customary skill and knowledge which normally prevails at the time and place."); Marzullo v. Maryland, 561 F.2d 540 at 540 (4th Cir. 1970)("within the range of competency demanded of attorneys in criminal cases"); Washington v. Watkins, 655 F.2d 1346, at 1355 (5th Cir. 1981)("counsel reasonably likely to render and rendering reasonably effective assistance"); Boyd v. Estelle, 661 F.2d 388, at 389 (5th Cir. 1981)(counsel's performance must be "seriously inadequate"); Beasley v. United States, 491 F.2d 687, at 696 (6th Cir. 1974) ("counsel must perform at least as well as a lawyer with ordinary training. . . and must conscientiously protect his client's interest"); United States ex rel. Edwards v. Warden, 676 F.2d 254, at

the phrase "effective assistance of counsel" as developed by Courts under the guise of McMann is fraught with error because it contemplates a degree of success as a constitutional mandate. See, United States v. Hasting; Engle v. Isaac; Wainwright v. Sykes; Estelle v. Williams, supra. Furthermore, as Judge Leventhal noted after his review in DeCoster such a "standard" has served only to generate a "semantic merry-go-round." 624 F.2d at 206.

(Footnote 24 cont.) 258 (7th Cir. 1982) ("within the reasonable range...constitutionally required") United States v. Weston, 708 F.2d 302 (7th Cir. 1983)(representation which is in any aspect . . . shockingly inferior to what may be expected of the prosecution's representation"); Long v. Brewer, 667 F.2d 742, at 745 (8th Cir. 1982) ("behavior. . .falling measurably below that which might be expected from an ordinary fallible lawyer"); Cooper v. Fitzharris, 586 F.2d 1325 at 1330 (9th Cir. 1978)("serious dereliction); Dyer v. Crisp, 613 F.2d 275, at 278 (10th Cir. 1979)("skill, judgment and diligence of a reasonably competent defense attorney").

With such endless ambiguity any lawyer's performance can be assaulted, even upon the same act or omission, claiming that he should have done the other. See, Williams v. Maggio, 679 F.2d 381 at 393 (5th Cir. 1982)("There is little doubt that had trial counsel [called witnesses]proposed by petitioner, this Court would now face an ineffectiveness of counsel argument based thereon"). Lawful judgments are mired in such verbiage to the extent that justice and finality become an illusion and abusive manipulation of the great writ, routine[25]. See, Paprskar v. Estelle, 612 F.2d 1003, at 1008-1009 (5th Cir. 1980)(Coleman, C.J., concurring). Even

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[25]See, also, Evans v. Bennett, 440 U.S. 1301, at 1303 (1979)(Rehnquist, J.); Friendly, "Is Innocence Irrelevant?" supra; Bator, "Finality in Criminal Law", supra.

a casual examination of West's Federal Reporter reveals burgeoning claims of ineffective counsel under such amorphous "standards". Depending on the predilections and experience of any given Court such verbiage can mean virtually anything, including that a defendant need only show something which might be "helpful" was omitted. See, Washington v. Strickland, 673 F.2d 879 at 901-902 (5th Cir. 1982)(panel opinion); see also, United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982) cert. granted, 32 Crim. L.Rep. 4193 (1983)(no showing of prejudice required; no evidentiary hearing or government response permitted).

This Court should not adopt such a test which requires that an unsuccessful attorney be routinely put on trial after a defendant has been convicted. McMann

v. Richardson, never contemplated such a result. In McMann the court only intimated without example, that advice to plead guilty in the face of a manifestly coerced confession and a substantial likelihood of acquittal on the prosecution's remaining evidence, could be a denial of the right to counsel[26]. As in the foregoing authority, as a matter of common sense, such a circumstance has a substantial effect upon the outcome of the proceeding and is tantamount to no counsel at all under the Sixth Amendment and hence fundamentally unfair. See, Pennsylvania ex rel. Herman

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[26]The McMann court insisting upon the integrity of the guilty plea, reversed the circuit court's order granting an evidentiary hearing, holding that a bare claim of a coerced confession was not sufficient for relief. 397 U.S. at 771. The defendants apparently made no allegation that the prosecution's evidence was otherwise deficient. Id. at 767-775.

v. Claudy, 350 U.S. 116 (1956)(uncounseled and coerced confession). The obiter dicta in McMann was therefore not an invitation to detailed supervision of defense practices or for wholesale abandonment of "fundamental fairness" as a standard of constitutional review. The consistent decisions of this Court wholly vitiate such a rational. The State submits that where the record demonstrates that a defendant received a fair proceeding, then he received "constitutionally adequate representation," which is all that is required. This Court should therefore reaffirm that analysis under Gideon and its progency and clarify the obiter dicta in McMann. Cf., United States v. Ross, ___U.S.___, 102 S.Ct. 2157, at 2167-2168 (1982)[declining to follow dicta and clarifying Robbins v. California, 453 U.S. 420 (1981)].

3. BURDEN OF PROOF

This Court has consistently required that the burden of proof rests entirely with a defendant on collateral claims and that the proper analysis, like DeCoster, Knight and the "farce and mockery" decisions, is whether a defendant has been denied fundamental due process and a fair trial. See, United States v. Frady; Engle v. Isaac, supra[27].

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[27]see also, e.g. United States v. Campa, 679 F.2d 1006, 1014 (1st Cir. 1982)(the defendant must bear the burden of proof); United Statesv. Baynes, 687 F.2d 659, 670-671 (3d Cir. 1982)(Defendant must "demonstrate that there is a 'reasonable possibility' that had the error of which he complains not occurred, the jury might have arrived at a different outcome"; Defendant must "demonstrate that his attorney's ineffectiveness was not harmless beyond a reasonable doubt)"; Rubio v. Estelle, 689 F.2d 533, 535 (5th Cir. 1982)(habeas corpus petition must show an "adverse impact upon the fairness of her trial resulting from [counsel's] lapse"); Youngblood v. Maggio, 696 F.2d 407, 409-410 (5th Cir. 1983)(habeas

In Darcy v. Handy, 351 U.S. 454 at 462 (1956), the court explained that a defendant seeking to set aside his trial must bear the entire burden of proof and must show actual prejudice:

> "While this court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the results set aside, and that it be sustained not as a matter for speculation but as a matter of demonstrable reality.'" [Emphasis added; citations omitted].

Similarly, and consistent with DeCoster's rejection of Judge Bazelon's check lists of "do's and "don'ts", in Cupp v. McNaughten, 414 U.S. 141 at 146 (1973) the court explained that a defendant must bear the entire burden and must still show a denial of fundamental fairness

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(Footnote 27 cont.) petitioner must show counsel's performance "was so inadequate as to render his trial unfair").

irrespective as to whether the error complained of is totally improper:

> "Before a Federal Court may overturn a conviction resulting from a state trial. . .it must be established not merely that the [State's action] is undesirable, erroneous; or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the XIV Amendment."

More recently, in Frady, the court explained that in federal collateral proceedings, a defendant must bear a greater burden of proof entirely:

> "By adopting the same standard of review for §2255 motions as would be applied on direct appeal, the Court Appeals accorded no significance whatever to the existence of a final judgment perfected by appeal. Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when as here, he already had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next

in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect." [Emphasis added]. 102 S.Ct. at 1593.

The Frady court further explained:

"It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a colteral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice. [quoting] United States v. Addonizio, 442 U.S. 178, 184, 99 S.Ct. 2235, 2239, 60 L.Ed.2d 805 (1979)(footnotes omitted)."

* * *

"The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. [quoting] Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1736, 52 L.Ed.2d 203 (1977)." [Emphasis supplied]. Id.

See also, Hawk v. Olson, 326 U.S. 271 at 279 (1945)("Petitioner carries the burden in a collateral attack upon a final judgment"); Johnson v. Zerbst, 304 U.S. 458 (1937)(same). In a companion case to Frady, in Engle v. Isaac, the Court explained that federal collateral attacks upon final state courts judgments even more strongly necessitate a Defendant carrying the whole burden to show constitutional error because of special finality and comity concerns:

> "Respondents, finally, argue that we should replace or supplement the cause-and-prejudice standard with a plain-error inquiry. We rejected this argument when pressed by a federal prisoner, see United States v. Frady, U.S. , 102 S.Ct. 1584, 71 L.Ed.2d , and find it no more compelling here. The federal courts apply a plain-error rule for direct review of federal convictions. Fed.Rule Crim. Proc. 52(b). Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas corpus relief for state prisoners is "greater

> than the showing required to establish plain error on direct appeal." Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed. 2d 203 (1977); United States v. Frady, ___ U.S. ___, 102 S.Ct. 1584, 71 L.Ed.2d ___." 102 S.Ct. at 1575.

The present opinion contrary to the foregoing authority apparently considers that the present matter is on direct review and that the State must again bear a substantial burden to rebut a minimal "prima facie" showing by the Defendant. Under Frady, Engle and the foregoing authority, the present allocation of the burden of proof by the Eleventh Circuit is plainly erroneous. On collateral review, as this Court's decisions demonstrate, a defendant must bear the entire burden of persuasion.

4) DEGREE OF PROOF

The Eleventh Circuit erroneously affirmed the panel's view that a defendant need not show any likelihood that the matters he complains of had any affect upon the outcome of the proceeding. The most compelling demonstration of error in such a conclusion, is a comparison with the seminal decision of the court in United States v. Agurs, 427 U.S. 97 (1976). Essentially, the Defendant in the present case seeks to overturn the result below with "new evidence" which he claims his counsel failed to produce. In United States v. Agurs, in assessing the effect of new evidence consisting of Brady material upon a claim for a new trial, the court clearly delimited claims of constitutional error thus:

> "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." [Emphasis added]. 427 U.S. at 109-110.

More important to our present analysis however, the Agurs court conclusively held that a complaint of error concerning new evidence does not rise to constitutional magnitude unless there is a substantial likelihood that it would have affected the outcome of the cause:

> "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt rather or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." [footnote omitted; emphasis added]. Id., at 112-113.

Cf. also, Engle, 102 S.Ct. at 1574. In particular, the Agurs court opined that a defendant has a greater burden of proof to show that the outcome of a trial would be different when the new evidence is from a "neutral" source (rather than the prosecution), Id. at 111. This is precisely the present circumstance.

Consistent with Agurs, in Chambers v. Maroney, 399 U.S. 42, at 53-54 (1970) the Court rejected without a hearing the defendant's claim that counsel was ineffective because he was only appointed on the day of trial, where the record showed that the defendant had been appointed an attorney earlier than the first day of trial. 399 U.S. at 53-54. The thrust of the Chambers opinion was that there was no likelihood of an affect upon the outcome of the proceeding. Cf., also, 399 U.S. at 60 (Harlan, J. dissenting). More recently in United States v. Valenzuela-Bernal, ___U.S.___, 102 S.Ct. 3440 (1982)

the Court also held that with respect to Sixth Amendment claims in deportation proceedings, a defendant must show that his claims would have affected the outcome of the proceedings, citing inter alia, United States v. Agurs, supra. See also, Smith v. Phillips, ___ U.S.___, 102 S.Ct. 940 (1980)(fair trial and fundamental due process claims must be examined from the standpoint of the affect if any upon the outcome of the trial); Kentucky v. Wharton, 441 U.S. 786, at 790-791 (1979)(same); cf., Hopper v. Evans, ___U.S.___, 102 S.Ct. 2049 (1982)(same); United States v. Morrison, 449 U.S. 361 (1981)(claim of Sixth Amendment violation had no effect upon outcome); Petition for Certiorari at notes 9, 12 and 13 (summary of state and federal decisions)

The State submits that the "heavy burden" standard in Agurs and the

"outcome" analysis of the foregoing authority, are totally consistent with the policy and underlying philosophy in collateral proceedings noted in Frady and are the central motivation for the rule in DeCoster and Knight. When matters a defendant complains of have no likely affect upon the outcome, it denigrates the entire criminal justice process to set aside the proceeding and flys into the face of any harmless error requirement. See, United States v. Hasting, ___U.S.___, 103 S.Ct. 1974 (1983). It is therefore not asking too much and indeed is consistent with the overwhelming substantive law that a defendant bear the burden to make such an initial showing. The present Eleventh Circuit opinion manifestly fails to adhere to that proper constitutional analysis.

5) MISAPPLICATION OF UNITED STATES V. FRADY.

The Eleventh Circuit in its opinion purports to apply United States v. Frady, in rejecting the burden of proof explained in DeCoster and Knight. See, 693 F.2d at 1260-1262. This is a plainly erroneous reading of Frady. The Eleventh Circuit citing Frady holds that a defendant must show only that the errors he complains of, "worked to his actual and substantial disadvantage." Id. However, this standard is only part of this Court's holding in Frady. Under Frady, a defendant must also show that the errors he complained of were such that they, "infect[ed] his entire trial with error of constitutional dimension" [emphasis added]. 102 S.Ct. at 1596. The Frady court in fact, rejected the defendant's claims because the evidence against him was overwhelming. 102 S.Ct. at 1596-1597; compare also, United

States v. Valenzuela-Bernal; Hooper v. Evans, supra. The balance of the phrase in Frady and the application of it in Frady reveal that error claimed on collateral review must raise a substantial likelihood of an affect upon the outcome of the proceeding. The present decision by the Eleventh Circuit therefore constitutes a complete misreading of United States v. Frady, and a substantial departure from both the Rule in Frady and the proper constitutional analysis of the burden and extent of proof required by this Court's decisions. To the contrary, the apparent intent of the Eleventh Circuit is to relax the standard for review of constitutional error and a defendant's burden of proof directly in the face of Frady, Agurs and the foregoing authority.

6) DEFENDANT'S COUNSEL PROVIDED "CONSTITUTIONALLY ADEQUATE REPRESENTATION."

The State has provided this Court with virtually the total record below in the Joint Appendix. In considering the importance of this issue (Discussion supra at 67-81) the simplicity of the present facts and the already needless circle of litigation herein, the State would urge this Court to consider the record provided by the State and dispose of this matter[28]. See, United States v. Hasting, 103 S.Ct. at 1981. First of all, as is evident upon the face of the record as discussed at pp. 60-67 (particularly in Judge Fuller's testimony), a

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[28]This Court should also consider that at least two of the victims were of such an age and condition, see JA162-JA176, that they may not be able to recite their ordeal again. See, Morris v. Slappy, ___ U.S.___, 103 S.Ct. 1610, at 1617 (1983).

battery of lawyers and pages of non-statutory mitigation could not have saved the Defendant from his fate. Secondly, as reflected in the testimony of Mr. Tunkey, his presentation and defense was soundly based upon his extensive experience; intimate knowledge of the trial judge and a reasoned tactical choice of the best course of action:

> "Tunkey, Washington's court-appointed counsel, was a competent and seasoned criminal lawyer, thoroughly experienced in criminal and capital cases. Relying on his experience in prior capital cases and his familiarity with his client and the trial judge, the attorney, faced with the above undisputed facts, reached a reasoned, tactical decision as to the only course of action which he thought could result in a sentence of life imprisonment rather than a death sentence. Tunkey testified that the only strategy he believed to have a chance of success, given the predilections of the sentencing judge with whom he had become familiar in the course of his practice in the area, was the strategy he pursued. Aware the judge normally responded favorable to a free, unqualified,

> unbargained for admission of guilt, Tunkey thought the only hope of leniency, given the nature of the crimes, was for Washington to show remorse and seek mercy." Washington v. Strickland, 693 F.2d at 1286 (Roney, Fay and Hill, J.J., dissenting).

Furthermore, as noted above Tunkey was faced with catastrophic and overwhelming evidence which his own client had chosen not to dispute. Even at the critical moment of sentencing (though his memory was dimmed by the passage of five (5) years), Tunkey testified that his client wanted no one at the sentencing proceeding. See, T43 (JA408). It is not remotely constitutional error nor grounds for relief for counsel to have made such well-reasoned, tactical choices under such circumstances. See, Jones v. Barnes, ___ U.S.___, 103 S.Ct. 3308 (1983); cf., Engle v. Isaac; McMann v. Richardson, supra.

7) MISAPPLICATION OF FAYERWEATHER V. RITCH

The Eleventh Circuit's reliance upon Fayerweather v. Ritch, 195 U.S. 276 (1904), to exclude the testimony of Judge Fuller is a complete departure from the substantiave law and United States v. Agurs, and constitutes a plainly erroneous reading of Fayerweather. In the present case, Judge Fuller's testimony was not presented to impeach his verdict nor to disclose any mental impressions or conclusions, which he made in reaching any verdict. Compare, Fayerweather v. Ritch, supra; United States v. Crutch, 566 F.2d 1311 (5th Cir. 1978). Rather, Judge Fuller was called upon to testify as an expert witness. He was indeed offered and accepted by all concerned as an expert witness. See, JA443-JA445. An expert witness may under Rule 704 of the

Federal Rules of Evidence testify as to an ultimate fact, to wit:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

The testimony of Judge Fuller under Rule 704 was also consistent with the provisions of 28 U.S.C. Sec. 2245, which provides that a trial judge may file a certificate as to the basis for a ruling including a sentence, which shall be admitted into evidence in any subsequent proceeding. See, e.g. Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978)(sentence); Hampton v. Wyrick, 588 F.2d 632 (8th Cir. 1978)(state judge testifies as to sentence). Indeed, Gardner v. Florida, 430 U.S. 349 (1977), also contemplates that a sentencing trial judge must disclose and

"impeach" his sentencing judgment if he considered improper evidence[29].

Furthermore, in substance, Judge Fuller was called upon with respect to the effect of "new evidence". Consistent with Agurs Judge Fuller did only that which he must do under Agurs in evaluating "new evidence" and its effect if any upon the outcome of the proceeding[30]. Therefore Fayerweather has

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[29]If this Court has any doubt as to how far the Eleventh Circuit will go with Fayerweather v. Ritch, it need only look to Proffitt v. Wainwright, 685 F.2d 1227, at 1255 (11th Cir. 1982), cert. pending, U.S.Sup.Ct. Case No. 83-113, wherein the Court pursuant to Fayerweather rejected Gardner as justification for a trial court disclosing if he improperly sentenced a defendant.

[30]The Eleventh Circuit's analysis also herein totally undercuts the effect of this court's decision in United States v. Tucker, 404 U.S. 443 (1972), which contemplates precisely the present circumstance wherein the trial judge is ordered

been plainly misconstrued or should be overruled.

The Eleventh Circuit has also created a virtually untenable situation for the State in avoiding new trials in federal collateral proceedings. The Defendant may, by only a mere preponderance of the evidence, overturn his conviction, which was established beyond a reasonable doubt. The State is then placed in the position of <u>again</u> proving that the Defendant's conviction should be sustained beyond a reasonable doubt because there was no affect upon the outcome of the case, without being permitted to produce the best evidence to

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(Footnote 30 cont.) to reconsider his verdict in terms of a change in the evidence. <u>See, also, Smith v. Phillips</u>, ___ U.S. ___, 102 S.Ct. 940 (1982). Indeed, sending the present matter back to the state trial court for a new proceeding would be a useless gesture in the face of Judge Fuller's testimony, where he is the sitting judge for this matter.

support such a conclusion. Certainly the trial judge in any circumstance is the best evidence of that event as reflected by this court's analysis in Agurs and similar decisions[31]. It is irrational to suggest that Judge Fuller's testimony would be excluded if he had said that he would not impose the death penalty based upon the new evidence. See, Washington v. Strickland, 673 F.2d 879, at 911 (5th Cir. 1982)(Roney, J. dissenting).

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[31] See United States v. Tucker, 404 U.S. at 452 (The Chief Justice and Blackmun, J. dissenting: "Surely Judge Harris, of all people is the best source of knowledge as to the effect, if any, of these two convictions in his determination of the sentence to be imposed").

VII

CONCLUSION

This Court should recognize that, which is obvious to even a casual observer herein. If this Court permits interference with the State's right to carry out its judgment and sentence in a case such as the one at bar, for all practical purposes, otherwise valid judgments and sentences obtained under statutes found constitutional by this Court will be an exercise in futility. The well reasoned opinions of two state trial courts; two Florida Supreme Court opinions and the opinion of this Court's own United States District Court demonstrate that there is no rational ground for a contention that the death sentences are constitutionally inappropriate herein. The State has manifestly taken all of the

steps required of it and the State's lawful judgment and sentence herein should therefore be carried out. The present opinion should therefore be vacated and the petition for a writ of habeas corpus denied.

RESPECTFULLY SUBMITTED on this__ day of August, 1983, at Tallahassee, Florida.

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